

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77 1354

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1354

B.
P/S

UNITED STATES OF AMERICA,

Appellee,

-v.-

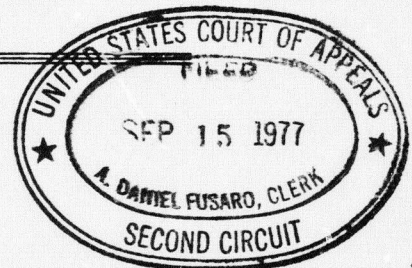
AMREP CORPORATION, RIO RANCHO ESTATES, INC.,
ATC REALTY CORPORATION, HOWARD W. FRIED-
MAN, CHESTER CARITY, HENRY L. HOFFMAN, and
DANIEL FRIEDMAN,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX OF UNITED STATES OF
AMERICA AND ALL DEFENDANTS

Volume 1 - Pages A-1 to A-32



ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
One St. Andrew's Plaza
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PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

-v.-

AMREP CORPORATION, RIO RANCHO ESTATES, INC.,
ATC REALTY CORPORATION, HOWARD W. FRIED-
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6-17-77 Filed notice that the 2nd supplemental record on appeal has been certified & transmitted to the USCA.

6-22-77 Filed affid & notice of motion for an order vacating their Judgments of convictions.. ret 6-29-77.

6-22-77 Filed memorandum of law in support of deft's motion to vacate their convictions.

6-27-77 Filed memorandum of law in opposition to deft's motion to vacate their convictions.

6-27-77 Filed Govt's affid in opposition to deft's motion for a Writ of error coram nobis vacating the judgments of conviction.

7-21-77 Filed OPINION # 46194 - Deft's move pursuant to 28 USC 1651 for a writ of coram nobis vacating the judgments of conviction entered against them on March 10, 1977 - Motion denied So Ordered METZNER,J. M/N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

-against- :

S 76 Cr. 644 (CMM)

AMREP Corporation, et al., :

Defendants. :

-----X

QUESTIONS TO BE ASKED OF
PROSPECTIVE JURORS ON BEHALF OF
DEFENDANTS AMREP CORPORATION, RIO RANCHO
ESTATES, INC., ATC REALTY CORPORATION,
HOWARD W. FRIEDMAN, AND HENRY L. HOFFMAN

Defendants AMREP Corporation, Rio Rancho Estates, Inc., ATC Realty Corporation, Howard W. Friedman, and Henry L. Hoffman request this Court to ask all of the following questions of the prospective jurors in this case. In each case where a positive answer is elicited, we request the Court to ask whether the particular fact would tend to influence the prospective juror for or against the defendants or for or against the prosecution.

I

INTRODUCTION

Do you understand that the purpose of this questioning is to help the Court, the prosecution, and the defense to pick a fair jury?

Do you understand that these questions are not asked out of idle curiosity or in an effort to delve into your personal life, but in order to help us determine whether you would be a good and fair juror in this case?

Would you feel that anyone thinks less of you if you are not selected as a juror in this case?

Do you understand that it is your duty as a citizen to answer each of these questions accurately and candidly and that your forthrightness in answering these questions is as important a responsibility as passing on the guilt or innocence of the defendants in this case?

This trial may take six months or so. Would that cause a hardship to you or your family?

If so, describe why it would be difficult for you to be a juror on this case.

II

GENERAL BACKGROUND

Where were you born?

Where did you grow up?

Where do you presently live?

How long have you lived there?

If you have lived there for less than ten years, where did you live previously?

Have you ever lived in the southwestern United States? If so, what states and when?

What is your age?

What is your educational background?

Are you married?

Are you or your spouse presently employed?

If so, what are your present occupations?

Who are your present employers?

What are your employment duties?

How long have you been employed at your present positions?

Have you or your spouse ever worked as a salesperson or been paid on a commission basis?

If so, when and where?

What did you sell?

How were your commissions figured?

Have you or your spouse ever been self-employed?

If so, when and where?

What did you do?

Have you or your spouse ever worked for the state or federal government?

If so, when and where?

What were your employment duties?

Have you ever been active in any political organizations?

If so, which ones and when?

What did you do?

Do you have children?

If so, how many children do you have and how old are they?

Were you in military service; if so, what branch were you in; what was your rank; how long were you in the service; were you ever on any courts martial; were you ever a member of Military Police?

III

ABILITY TO BE IMPARTIAL IN THIS CASE

Do you, you spouse or any friends or relatives now or have you or they ever belonged to any groups or organizations which concern themselves with the relationship between businesses and their customers?

If so, which ones?

1 gtjw 61

2 If he did something wrong, fine, punish
3 him, fine. After that, forgive him. Don't hold it
4 against him.

5 Q In other words, you say that you could not
6 convict anybody because if he is convicted nobody will
7 ever forgive him? Is that what you are saying?

8 A This is right.

9 I have my seventeen year old boy, he was --
10 he gave backtalk to a policeman one time -- he was
11 sixteen -- and the policeman had a low boiling point,
12 arrested him.

13 I hired a lawyer, paid \$100 to get his name
14 cleared. I didn't want that on his record.

15 Ten years later, my boy wants to join the police
16 force in Yorktown Heights, they have it on his record
17 he was arrested. It is going to -- for the rest of his
18 life, he was arrested.

19 Q All right. You are excused.

20 (In open court)

21 MS. HYNES: Do you want to inquiry about any
22 conversation by Mr. Gavrell?

23 THE COURT: That is not the type of conversa-
24 tion I inquire about.

25 THE CLERK: Juror No. 2 is now Roslind Eager.

1 gtjw 62

2 BY THE COURT

3 OF MISS EAGER:

4 Q Miss Eager, are you employed?

5 A No, I'm not at the present.

6 Q Do you engage in any type of employment
7 formerly?

8 A Well, just some waitressing experience. I'm
9 looking for a job.

10 Q Have you heard the questions I put to the
11 members of the panel?

12 A Yes.

13 Q From the answers that you would give to those
14 questions, is there any information that you should bring
15 to the attention of Court or counsel?

16 A No.

17 Q Do you know of any reason why you cannot sit
18 on this jury and render a true and just verdict according
19 to the evidence?

20 A No.

21 BY THE COURT

22 OF MRS. RUSSO:

23 Q Mrs. Russo, are you employed?

24 A No, I'm not, your Honor.

25 Q Is Mr. Russo employed?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
 :
-against- : NOTICE OF MOTION
 :
AMREP CORPORATION, RIO RANCHO : S 76 Cr. 644 (CMM)
ESTATES, INC., ATC REALTY CORP., :
HOWARD FRIEDMAN, CHESTER CARITY, :
DANIEL FRIEDMAN and HENRY HOFFMAN, :
 :
Defendants. :
 :
-----X

S I R :

PLEASE TAKE NOTICE that upon the motion and affidavit annexed hereto, the memorandum of law submitted herewith and all prior proceedings, defendants AMREP Corp., RIO RANCHO ESTATES, Inc., ATC REALTY Corp., Howard W. Friedman, Chester Carity, Henry L. Hoffman, and Daniel Friedman will move this Court, before the Honorable Charles M. Metzner, United States District Judge, at the Courthouse in Foley Square, New York, New York, on June 29, 1977 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard for an order vacating the judgments of conviction entered against them and for such other and further relief as to the Court seems just and proper.

Yours, etc.,

STANLEY S. ARKIN, p.c.
Attorneys for Movants
600 Third Avenue
New York, New York 10016

By

Stanley S. Arkin
Stanley S. Arkin

TO: HONORABLE ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,	:	
	:	
-against-	:	MOTION FOR WRIT OF
	:	ERROR <u>CORAM NOBIS</u>
AMREP CORPORATION, RIO RANCHO	:	
ESTATES, INC., ATC REALTY CORP.,	:	
HOWARD FRIEDMAN, CHESTER CARITY,	:	S 76 Cr. 644 (CMM)
DAN L FRIEDMAN and HENRY HOFFMAN,	:	
	:	
Defendants.	:	
	:	
	:	

-----X

1. This motion is made by the defendants pursuant to 28 U.S.C. §1651 for a writ of error coram nobis vacating the judgments of conviction entered against them in the United States District Court for the Southern District of New York on March 10, 1977.

2. Subsequent to a trial, defendants were convicted of 20 counts of Mail Fraud (18 U.S.C. §1341) and 5 counts of violating the Interstate Land Sales Full Disclosure Act (15 U.S.C. §1703[a]).

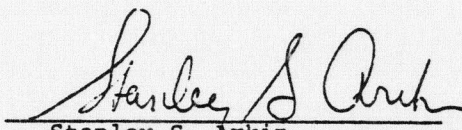
3. Each individual defendant was sentenced to a concurrent six-month term of imprisonment on each count. AMREP Corporation was sentenced to pay a fine of \$10,000 on each of the 20 mail fraud counts and a fine of \$5,000 on each of the 5 interstate land sales fraud counts. The other corporate defendants were not fined. Execution of the sentences of imprisonment was stayed pending appeal and the fines have been paid into an escrow account.

4. Appeals from the judgments of conviction are now sub judice in the United States Court of Appeals for the Second Circuit.

5. Aside from the direct appeal from the judgments of conviction and the instant motion, no other petitions, applications or motions have been filed with respect to the judgments.

6. The instant motion is brought upon the ground that Rosalind Eager, who served as juror number 2 in defendants' trial, was not a resident of the Southern District of New York at the time she was sworn, but rather was and had been a resident of Oneonta, New York in the Northern District of New York for a substantial period of time preceding the trial. Accordingly, defendants were deprived of their Sixth Amendment right to a jury composed of residents of the Southern District of New York.

WHEREFORE, defendants' motion to vacate the judgments of conviction should be granted.


Stanley S. Arkin

FILED: New York, New York
June 22, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
-against- : S 76 Cr. 644 (CMM)
AMREP CORPORATION, et al., : AFFIDAVIT
Defendants. :

-----X
STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Paul G. Mahon, being duly sworn, deposes and says:

I am a private investigator employed by INTERTEL, Inc.
I submit this affidavit in support of defendants' motion to
vacate the judgments of conviction entered against them on March
10, 1977.

I was retained by STANLEY S. ARKIN, p.c., defendants'
attorneys, to investigate the residency of Rosalind Eager who
served as juror number 2 at defendants' trial.

On May 18, 1977 I interviewed Rosalind Eager at her
home located at 41 Academy Street, Oneonta, New York. I asked
her how long she had been living in Oneonta. She told me that
she had been living in Oneonta for the last five years; that
while at college she resided at 35 West Street in Oneonta; and
that following her graduation, in July, 1976, she moved to her
current address--41 Academy Street, Oneonta. Ms. Eager also
said that during 1976 she was employed at Ruffino's Pizzeria at
100 Main Street, Oneonta.

I asked Ms. Eager where she had received the notice
of jury duty. She told me that it was mailed to her family's

home in Middletown, New York. She further said that she spoke to her father, who is an attorney, about the possibility of serving on a jury and he advised her that in his opinion there was no reason she could not serve.

Ms. Eager stated that during the trial she stayed at her father's house in Middletown, but that on weekends she went back to Oneonta.

On June 16, 1977, I interviewed Stephen and Angela Katsigianis. I had previously learned that Mr. and Mrs. Katsigianis were the owners of the house at 35 West Street, Oneonta, during the time that Ms. Eager had lived at that address. Mr. Kastigianis told me that in January, 1975, Ms. Eager executed a lease with him and became his tenant at 35 West Street, Oneonta. He further told me that she paid her monthly rent by personal check drawn on an Oneonta, New York bank. He also informed me that in June, 1975, Ms. Eager moved from 35 West Street to another residence nearby in Oneonta.

Further investigation revealed that on July 16, 1976, Ms. Eager filed a change of address notice with the United States Post Office notifying the post office that her address changed as of that date from 16 West Street, Oneonta, New York to 41 Academy Street, Oneonta, New York.

On May 26, 1977, I interviewed Ms. Eager's mother at her husband's law offices at 41 Dolsan Avenue, Middletown, New York. Ms. Eager's mother told me that when she received the jury notice addressed to her daughter she sent it to her daughter in Oneonta.

On June 20, 1977, I interviewed Joseph Capra, an accountant for Ruffino's Pizzeria in Oneonta. He confirmed that Ms. Eager was employed at Ruffino's between approximately August 2,

1976 and September 21, 1976. He further stated that her 1976 W-2 earnings statement was mailed to her at and carried the address of 41 Academy Street, Oneonta, and that on her W-4 statement concerning the number of claimed deductions, she listed her home address as "41 Academy Street, Oneonta, New York."

Paul G. Mahon
Paul G. Mahon

Sworn to before me this
21st day of June, 1977.

Ellice Lynn Witkowski

ELICE LYNN WITKOWSKI
Notary Public, State of New York
B1:4525272 - New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :

-against- :

AMREP CORPORATION, RIO RANCHO
ESTATES, INC., ATC REALTY CORP., :
HOWARD FRIEDMAN, CHESTER CARITY,
DANIEL FRIEDMAN, and HENRY HOFFMAN, :

S 76 Cr. 644
(CMM)

Defendants. :

-----X
MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO
VACATE THEIR CONVICTIONS

This memorandum is submitted in support of defendants' motion to vacate their convictions* upon the ground that they were deprived of their Sixth Amendment right to a "jury of the State and district wherein the crime shall have been committed."

The affidavit submitted in support of this motion establishes that Rosalind Eager, who served as Juror Number 2 at the trial of this case, was not a resident of the Southern District of New York at the time she was sworn, but rather is and had been a resident of Oneonta, New York in the

*The motion to vacate is made on behalf of the defendants pursuant to the All Writs Statute, 28 U.S.C. §1651, for a writ of error coram nobis.

Northern District for a substantial period of time preceding the trial. As a result, defendants were deprived of their Sixth Amendment right to a jury composed of residents of the Southern District of New York.

The right to trial by jury as guaranteed by the Sixth Amendment to the Constitution "is fundamental to the American scheme of justice." Duncan v. Louisiana, 391 U.S. 145, 149, reh. denied, 392 U.S. 947 (1968). And the jury guaranteed is a "jury of the State and district":

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . ." (Emphasis supplied.) (United States Constitution, Amendment VI.)

In Zicarelli v. Gray, 543 F. 2d 466, 481-2 (3d Cir. 1976), an en banc Third Circuit held:

"The Sixth Amendment prohibits courts . . . from obtaining petit jurors from beyond the boundaries of two large units, the state and the federal judicial district. . . . The Framers were concerned . . . with a situation in which petit jurors came from without the state or without the district."

The Supreme Court has reasoned that the right to a jury of the State and district was as important and fundamental to the Framers as the right to trial by jury itself.* In

*One commentator has written:

"The Sixth Amendment preserves one of the oldest institutions of the common

Williams v. Florida, 399 U.S. 78 (1970), the issue before the Court was whether the Sixth Amendment's guarantee to trial by jury encompassed the right to a jury composed of twelve. In reviewing the Amendment's history the Court noted that as originally introduced by James Madison in the House, the Amendment preserved the right to trial by "jury of freeholders of the

(fn contd)

law--the jury of the vicinage." Blume, The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue, 43 Mich. L. Rev. 59, 60 (1944).

On August 25, 1774, the Provincial Congress of North Carolina, resolved:

"That trial by juries of the vicinity is the only lawful inquest that can pass upon the life of a British subject and that it is a right handed down to us from the earliest ages, confirmed and sanctified by Magna Carta itself." Quoted in Connor, The Constitutional Right to a Trial of the Vicinage, 57 U. Pa. L. Rev. 197, 208 (1909).

Also in 1774, the First Continental Congress stated:

"That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law. . . ." Documents of American History, 2d Commager ed., 83-84 (1940).

Thus, the failure of Article III's jury provision ("the trial of all crimes . . . shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed") to preserve the common law right to be tried by a "jury of the vicinage"--although setting out proper venue requirements--provided the impetus for including such a provision in the Sixth Amendment. See Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 105 (1923); Heller, The Sixth Amendment, (1951), at 31-33, 93.

vicinage and other accustomed requisited'" (emphasis supplied) (*id.*, 399 U.S. at 94). Among the "other accustomed requisites" was a jury composed of twelve. The version of the Sixth Amendment ultimately adopted, however, eliminated reference to "other accustomed requisites" but retained the right to a "jury of the State and district." In holding that the right to trial by jury did not include the right to a jury of twelve, the Supreme Court reasoned that by specifically providing for a "jury of the State and district"--also an accustomed requisite--Congress "knew how to use express language" when it "wanted to leave no doubt that it was incorporating existing common-law features of the jury system" (*id.*, 399 U.S., at 97).

Accordingly, the Sixth Amendment deprivation complained of in the instant motion is not the deprivation of an unspecified "accustomed requisite" of a jury trial, but rather, the deprivation of a right derived from "express language" used by the Framers to incorporate into our criminal jurisprudence a "common-law feature[] of the jury system." See also, *United States v. Mase*, ____ F. 2d ____, Slip op. 4037, (2d Cir. June 6, 1977).

In the instant case there was no "knowing and intelligent" waiver of the Sixth Amendment right to a "jury of the State and district." The defendants requested the trial court to ask all prospective jurors on voir dire examination questions regarding their present residence, length of time

they resided at their present residence, and if less than ten years, where they resided previously.* With respect to Ms. Eager, the Court asked none of these questions**--the truthful answers to which surely would have resulted in her disqualification. Indeed, aside from the constitutional mandate and provisions of the Jury Selection Act of 1968 (28 U.S.C.

*The precise questions submitted for voir dire examination of prospective jurors were as follows:

"Where do you presently live?
How long have you lived there?
If you have lived there for less
than ten years, where did you
live previously?"

**The only questions put by the Court to Ms. Eager were as follows:

Q. Miss Eager, are you employed?

A. No, I'm not at the present.

Q. Do you engage in any type of employment formerly?

A. Well, just some waitressing experience.
I'm looking for a job.

Q. Have you heard the questions I put to the members of the panel?

A. Yes.

Q. From the answers that you would give to those questions, is there any information that you should bring to the attention of Court or counsel?

A. No.

Q. Do you know of any reason why you cannot sit on this jury and render a true and just verdict according to the evidence?

A. No." (Transcript, Nov. 4, 1977, p. 62.)

§1865(b)(1)),* Article VI of the Jury Selection Plan of the United States District Court for the Southern District of New York provides that the "Chief Judge shall deem any person qualified to serve on . . . petit juries in the court unless he (1) is not a citizen of the United States. . . who has resided for a period of one year within the judicial district . . ." (Emphasis supplied.)

And as the Court wrote in United States v. McCorkle, 133 F. Supp. 169, 177 (D.N.J. 1955), rev'd on other grnds., 248 F. 2d 1 (3d Cir.), cert. denied, 355 U.S. 873 (1957):

"Where the juror was not asked, either specifically or in substance, a question concerning the allegedly disqualifying factor, even though the existence of it was unknown to the defendant until some time after the verdict was rendered, a defendant is not entitled to a new trial unless (1) that later discovered information conclusively establishes a disqualification as a matter of law. . . ." (Emphasis supplied.)

Here, the discovered information--that Ms. Eager was not a resident of the Southern District of New York--"establishes a disqualification as a matter of law," indeed, as a matter of constitutional law as well as statutory law.

*28 U.S.C. §1865(b) provides in relevant part:

"In making such determination [of whether a person is qualified to serve as a juror] the chief judge. . . shall deem any person qualified to serve. . . unless he-- (1) is not a citizen of the United States, 18 years old, who has resided for a period of one year within the judicial district. . . ."

The general rule that "[f]ailure to come within the statutory requirements [for jurors], such as citizenship, age, property, sex, and residence . . . may be waived by a defendant" (emphasis supplied) United States v. Rosenstein,* 34 F. 2d 630, 634 (2d Cir.), cert. denied, 280 U.S. 581 (1929), is thus not applicable here where what is at stake is a constitutional right. It is basic that a constitutional right may be found waived only where the waiver is "knowing and intelligent." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Adams v. United States ex rel. McCann, 317 U.S. 269 (1943).

As Mr. Justice Black wrote in Johnson v. Zerbst, supra:

"The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' . . . A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." (Id., 304 U.S., at 462-464.)

It follows that having been deprived of a constitutional right, and not having waived that right, the defendants are

*United States v. Rosenstein, supra; United States v. Haywood, 452 F. 2d 1330 (D.C. Cir. 1971); and Hoeppel v. Street, 17 F. Supp. 719 (D.D.C. 1937) deal with a waiver at trial of the residency requirement for jurors. None of those cases even mentions the constitutional right embodied in the Sixth Amendment and hence the waivers found in those cases are not apposite here. In any event, defendants did not waive in the instant case and had the Court, as set forth above, conducted the voir dire requested by the defense, the incapacity of the juror would certainly have been revealed.

entitled to a new trial.

DATED: New York, New York
June 21, 1977

Respectfully submitted,

STANLEY S. ARKIN, p.c.
Attorneys for Movants
600 Third Avenue
New York, New York 10016

STANLEY S. ARKIN
MARK S. ARISOHN
LEE CROSS
Of Counsel

-----X

UNITED STATES OF AMERICA,	:	
-against-	:	S 76 Cr. 644 (CMM)
AMREP CORPORATION, RIO RANCHO	:	<u>AFFIDAVIT</u>
ESTATES, INC., ATC REALTY CORP.,	:	
HOWARD FRIEDMAN, CHESTER CARITY,	:	
DANIEL FRIEDMAN and HENRY HOFFMAN,	:	
	:	
Defendants.	:	

-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PATRICIA M. HYNES, being duly sworn, deposes and
says:

I am an Assistant United States Attorney in the
Southern District of New York and I submit this affidavit in
opposition to defendants' motion for a Writ of Error coram
nobis vacating the judgments of conviction entered against
them in the United States District Court for the Southern
District of New York on March 10, 1977.

Defendants' motion is brought on the ground that
Rosalind Eager, who served as a juror, was not a resident of
the Southern District of New York at the time she was sworn.
The United States Attorney's Office has not made any factual
inquiry into the residency of Ms. Eager. However, even
assuming that Ms. Eager did reside outside the Southern
District of New York, it is not a ground to set aside these
judgments of conviction as is more fully set forth in the
accompanying memorandum of law.

WHEREFORE, your deponent respectfully requests that
defendants' motion in all respects be denied.

Patricia M. Hynes

Sworn to before me this
23rd day of June, 1977.

GLORIA MEYER
Notary Public, State of New York
No. 31-0335310
Qualified in New York County
Commission Expires March 30, 1979

RECEIVED

JUN 27 1977

STANLEY S. ARKIN, P.C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

S 76 Cr 644 (CMM)

AMREP CORPORATION, et al.,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO VACATE
THEIR CONVICTIONS

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

PATRICIA M. HYNES
Assistant United States Attorney

- Of Counsel -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-v-

AMREP CORPORATION, et al.,

Defendants.

:

:

S 76 Cr. 644 (CMM)

:

:

-----X
MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO VACATE
THEIR CONVICTIONS

This memorandum is submitted in opposition to defendants' motion to vacate their convictions on the ground that a juror was not a resident of the Southern District of New York.

ARGUMENT

Defendants clearly are not entitled to have their judgments of conviction set aside even assuming arguendo that they are correct with respect to their allegations concerning Ms. Eager's residence outside of the Southern District of New York. In U. S. v. Rosenstein, 34 F.2d 630, 634 (2d Cir.), cert. denied, 280 U. S. 581 (1929), the Second Circuit specifically held that requirements such as residency within the district do not go to make up the

essential qualities to enable a juror to perform his duties intelligently and impartially. The Second Circuit held that the failure to come within the statutory requirements such as residency may be waived by a defendant, "even where such waiver consists of excusable want of knowledge and even though he may have successfully objected to the juror sitting at the time of his examination."

In the Rosenstein case the Second Circuit quoted the following language in People v. Cosmo, 205 N. Y. 91 (1912):

"If defeated parties were in all cases to be permitted to move for new trials on such grounds as that a juror has passed the age of 70 when he sits in a case, or has disposed of his property, or that he is lacking in any other of the several technical qualifications which do not affect his intelligence,

and fairness, no judgment would ever be safe from attack, and no trial could ever be confined to anything like well-defined or limited issues."

In short, where the grounds for disqualification do not affect the impartial and intelligent performance of a juror's duties, the courts have refused to set aside convictions where a juror was not a resident of the district. U. S. v. Haywood, 452 F.2d 1330 (D. C. Cir. 1971).

In the Haywood case a juror had moved from the District of Columbia to Maryland. Defendant moved for a new trial on the basis of the juror's non-residence in the District of Columbia. The Court held:

"Regarding the non-residency of a juror, it is clear that such a factor does not impair the impartial and intelligent performance of a juror's duties. As a general rule, a party who fails to object to the service of a juror on grounds of residence, for whatever reason, should

be deemed to have waived the objection because violations of residency requirements do not reach these "essential qualities" of a juror. United States v. Rosenstein, 34 F.2d 630 (2d Cir. 1929). And in this case, although the juror had moved to Maryland, no actual prejudice has been shown."

In the instant case defendants point to no actual prejudice but attempt to argue constitutional ramifications of the non-residence of Ms. Eager. The courts clearly have rejected such arguments. Kohl v. Lehlback, 160 U.S. 293, 299 (1895).

While defendants point to their voir dire requests concerning residency of jurors, they did not specifically request the court to inquire as to Ms. Eager's residency. Nor have they given any reason for this eleventh hour attempt to set aside their convictions. Any infirmity regarding the residency of Ms. Eager has been waived and

does not provide any basis whatsoever for setting aside
defendants' conviction.

DATED: June 23, 1977

Respectfully submitted,

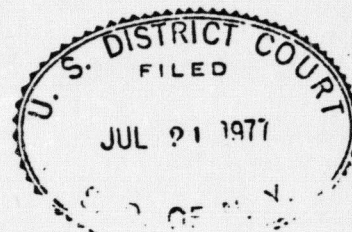
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Attorney for the United States
of America

PATRICIA M. HYNES
Assistant United States Attorney

- Of Counsel -

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA, :

 -against- :

AMREP CORPORATION, RIO RANCHO :
ESTATES, INC., ATC REALTY CORP., :
HOWARD FRIEDMAN, CHESTER CARITY, :
DANIEL FRIEDMAN and HENRY HOFFMAN, :

Defendants. :

576 Cr. 644
(CMM)

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METZNER, D. J.:

Defendants move pursuant to 28 U.S.C. § 1651 for a writ of error coram nobis vacating the judgments of conviction entered against them on March 10, 1977. This motion was filed a few hours after the argument before the Court of Appeals on the appeals from the judgments of conviction. Defendants allege that they were deprived of their Sixth Amendment right to a jury by the presence of a nonresident of the Southern District of New York on the panel.

Assuming that juror number 2 was indeed not a resident of the Southern District of New York at the time she was sworn, the court is not required to vacate the judgments of conviction. It is clear that such a factor does not impair the impartial and intelligent performance of a juror's duties. United States v.

Rosenstein, 34 F.2d 530, 634 (2d Cir. 1929); United States v. Haywood, 452 F.2d 1330 (D.C. Cir. 1971).

The Southern District residency requirement for jurors is statutorily based, 28 U.S.C. § 1865(b), and the general rule is that failure to satisfy the residency requirement is waived by a defendant after judgment is entered, even where defendant was ignorant of the fact and could have successfully objected to the juror sitting at the time of his or her examination.

Rosenstein, *supra*.

Motion denied.

So ordered.

Filed: New York, N. Y.
July 21, 1977

CHARLES M. METZNER
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA, :

-against- :

AMREP CORPORATION, RIO RANCHO :

ESTATES, INC., ATC REALTY CORP., :

HOWARD FRIEDMAN, CHESTER CARITY, :

DANIEL FRIEDMAN and HENRY HOFFMAN, :

Defendants. :

NOTICE OF APPEAL

S76 Cr. 644
(CMM)

- - - - - x

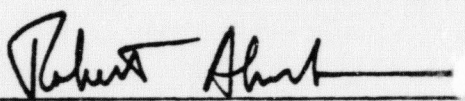
Notice is hereby given that Amrep Corporation, Rio Rancho Estates, Inc., ATC Realty Corp., Howard Friedman, Chester Carity, Daniel Friedman and Henry Hoffman, defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order entered July 21, 1977 by the United States District Court for the Southern District of New York denying the motion of said defendants for a writ of error coram nobis vacating the judgments of conviction entered against them on March 10, 1977.

Dated: New York, New York
July 28, 1977

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By 
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SEP 15 1977
U. S. ATTORNEY
SO. DIST. OF N. Y.